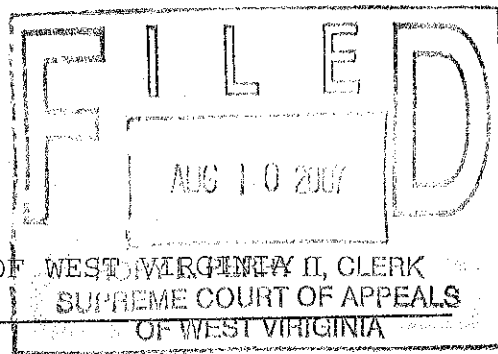


No. 33381



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

CHARLESTON

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

HARRISON COUNTY COMMISSION,
Roger Diaz, President,

Appellant,

v.

Civil Action No. 05-C-493-3

HARRISON COUNTY ASSESSOR,
Cheryl L. Romano, Assessor,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA
HONORABLE DAVID R. JANES, JUDGE (sitting by assignment)

BRIEF OF THE APPELLEE,
CHERYL L. ROMANO, HARRISON COUNTY ASSESSOR

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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TABLE OF CONTENTS

TABLE OF CITATIONS	ii
STATEMENT OF THE KIND OF PROCEEDING AND NATURE OF THE RULING BELOW	1
STATEMENT OF FACTS	2
STANDARD OF REVIEW	3
POINTS AND AUTHORITIES	3
DISCUSSION	4
I. <u>The West Virginia Legislature Created a Separate Category of Employees of County Assessors Through the Enactment of West Virginia Code § 11-1C-1 et seg. and Specifically Precluded any Involvement of the County Commission in the Decision to Hire Individuals Employed Under this Statutory Section</u>	4
CONCLUSION	12

TABLE OF CITATIONS

State Cases

<u>Bowers v. Wurzburg</u> , 205 W.Va. 450, 519 S.E.2d 148 (1999)	11
<u>Carvey v. West Virginia State Board of Education</u> , 206 W.Va. 720, 527 S.E.2d 831 (1999)	11
<u>Jones v. West Virginia State Board of Education</u> , 218 W. Va. 52, 622 S.E.2d 289 (2005)	3
<u>Martin v. West Virginia Division of Labor Contractor Licensing Board</u> , 199 W. Va. 613, 486 S.E.2d 782 (1997)	3
<u>Newark Insurance Company v. Brown</u> , 218 W.Va. 346, 624 S.E.2d 783 (2005)	11
<u>State of West Virginia v. General Daniel Morgan Post No. 548, V.F.W.</u> , 144 W. Va. 137, 107 S.E.2d 353 (1959)	8
<u>UMWA by Trumpka v. Kingdon</u> , 174 W.Va. 330, 325 S.E.2d 120 (1984)	11
<u>Webster County Commission v. Clayton</u> , 206 W. Va. 107, 522 S.E.2d 201 (1999)	9

Statutes and Regulations

W. Va. Code § 7-7-7	<i>passim</i>
W. Va. Code § 11-1C-1	2, 4, 5, 6
W. Va. Code § 11-1C-3	7
W. Va. Code § 11-1C-3(a)	7
W. Va. Code § 11-1C-4	2
W. Va. Code § 11-1C-8	<i>passim</i>
W. Va. Code § 11-1C-8(a)	<i>passim</i>
W. Va. Code § 11-1C-8(d)	6, 8, 9

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TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST
VIRGINIA

**STATEMENT OF THE KIND OF
PROCEEDING AND NATURE OF THE RULING BELOW**

The Circuit Court of Harrison County determined in its Order of September 18, 2006 that West Virginia Code § 11-1C-8 precluded County Commissions from interfering, directly or indirectly, with the Valuation Fund created and provided to West Virginia Assessors

for the purposes of financing the extra cost associated with the valuation and training mandated by West Virginia Code § 11-1C-1 et seq. Included in this statutory section is the employment of individuals to perform assessing and appraising duties upon the approval of the employment by the Valuation Commission. W. Va. Code § 11-1C-8. These Valuation Fund Employees are paid from the Valuation Fund. W. Va. Code § 11-1C-8.

This action was instituted by the Harrison County Commission by the filing of a Petition for Writ of Mandamus with the appellee filing a Cross-Petition for Writ of Mandamus. The Circuit Court denied the writ sought by the Harrison County Commission and granted the writ sought by the appellee.

STATEMENT OF FACTS

The Circuit Court of Harrison County considered the issue presented in this case based upon a stipulation of facts which are not critical to the determination of the application of West Virginia Code § 11-1C-1 et seq. and West Virginia Code § 7-7-7. However, in response to the assertions contained in the appellant's statement of facts, the appellee states that West Virginia Assessors do not have "unfettered" access to the Valuation Fund.

The Valuation Commission, established in accordance with West Virginia Code § 11-1C-4, approves the hiring of employees as well as the budget of each County Assessor with respect to the Valuation Fund. Accordingly, there are checks and balances established by

the West Virginia Legislature with respect to the monies available to West Virginia Assessors through the Valuation Fund.

STANDARD OF REVIEW

The appropriate standard of review for the denial of the extraordinary writ of mandamus is *de novo*. Jones v. West Virginia State Board of Education, 218 W. Va. 52, 622 S.E.2d 289 (2005); Martin v. West Virginia Division of Labor Contractor Licensing Board, 199 W. Va. 613, 486 S.E.2d 782 (1997).

POINTS AND AUTHORITIES

STANDARD OF REVIEW

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- I. The West Virginia Legislature Created a Separate Category of Employees of County Assessors Through the Enactment of West Virginia Code § 11-1C-1 et seq. and Specifically Precluded any Involvement of the County Commission in the Decision to Hire Individuals Employed Under this Statutory Section.

State of West Virginia v. General Daniel Morgan Post No. 548, V.F.W., 144 W. Va. 137, 107 S.E.2d 353 (1959)

Webster County Commission v. Clayton, 206 W. Va. 107, 522 S.E.2d 201 (1999)

UMWA by Trumpka v. Kingdon, 174 W.Va. 330, 325 S.E.2d 120 (1984)

Carvey v. West Virginia State Board of Education, 206 W.Va. 720, 527 S.E.2d 831 (1999)

Bowers v. Wurzburg, 205 W.Va. 450, 519 S.E.2d 148 (1999)

Newark Insurance Company v. Brown, 218 W.Va. 346, 624 S.E.2d 783 (2005)

West Virginia Code § 11-1C-8

West Virginia Code § 11-1C-1

West Virginia Code § 11-1C-4

West Virginia Code § 11-1C-8(a)

West Virginia Code § 7-7-7

West Virginia § 11-1C-8(d)

West Virginia Code § 11-1C-3(a)

West Virginia Code § 11-1C-3

DISCUSSION

- I. The West Virginia Legislature Created a Separate Category of Employees of County Assessors Through the Enactment of West Virginia Code § 11-1C-1 et seq. and Specifically Precluded any Involvement of the County Commission in the Decision to Hire Individuals Employed Under this Statutory Section.

The Circuit Court in the Order of September 18, 2006, correctly determined that West Virginia Code § 11-1C-8 precluded the appellant from interfering, directly or indirectly, with the fund created and provided to West Virginia Assessors by West Virginia Code § 11-1C-1, et seq. The appellant seeks to compel this Court to usurp the authority of the West Virginia Legislature and override the clear mandate of West Virginia Code § 11-1C-8 which precludes any control by County Commissions over the valuation fund created by West Virginia Code § 11-1C-8(a).

There is no ambiguity in either West Virginia Code § 7-7-7 or West Virginia Code § 11-1C-8 and any efforts by the appellant to

create confusion in these statutory sections must be disregarded. The legislature clearly intended to remove County Commissions from the fair and equitable valuation of property. W. Va. Code § 11-1C-1 et seq. This was correctly a decision of the legislature and should not be over turned by this Court.¹ The legislature created a separate category of assessor employees, reviewed by the Valuation Commission, but outside of the influence and control of County Commissions.

West Virginia Code § 11-1C-8 expressly provides, in pertinent part, as follows:

Notwithstanding any other provision of this Code to the contrary, assessors may employ citizens of any West Virginia county for the purposes of performing assessing and appraising duties under this Chapter upon approval of the employment by the Valuation Commission.

The Circuit Court correctly determined that this statutory section is clear, unambiguous and provides that the advice and consent of a county commission is not necessary for the employment of individuals hired under the Assessors' Valuation Fund created by West Virginia Code 11-1C-8. Not only is County Commission advice and consent not necessary, the Legislature clearly intended to exclude the County Commission from all aspects of the reappraisal process.

¹ The Harrison County Commission attempted during the 2006 and 2007 session of the West Virginia Legislature to amend West Virginia Code § 11-1C-8, however, Legislature refused to consider the modifications proposed by the Harrison County Commission.

The West Virginia Legislature passed West Virginia Code § 11-1C-1, et seq. in 1990. This statutory section is entitled "Fair and Equitable Property Valuation". The legislature determined that the purpose of this article was to "create a method to establish and maintain fair and equitable values for all properties".

West Virginia Code § 11-1C-8 provides that in order to finance the extra cost associated with the valuation training mandated by Article 1C, the legislature created a revolving valuation fund in each of West Virginia's fifty five (55) counties to be used exclusively to fund those activities and employees involved in assessing and appraising duties. West Virginia Code § 11-1C-8(a) provides that:

In order to finance the extra cost associated with the valuation and training mandated by this Article, there is created a revolving valuation fund in each county which shall be used exclusively to fund the assessor's office. No persons whose salary is payable from the valuation fund shall be hired under this section without the approval of the valuation commission, the hiring shall be without regard to political favor or affiliation and the persons hired under this section are not subject to the provisions of the Ethics Act in Chapter 6-B of this Code, including, but not limited to, the conflict of interest provision under Chapter 6-B of this Code. Notwithstanding any other provisions of this Code to the contrary, assessor's may employ citizens of any West Virginia county for the purpose of performing assessing and appraising duties under this chapter upon approval of the employment by the valuation commission.

West Virginia Code § 11-1C-8(d) provides as follows:

Monies due the valuation fund shall be deposited by the sheriff on a monthly basis as directed by the

Chief Inspector's office for the benefit of the assessor and shall be available to and may be spent by the assessor without prior approval of the county commission, which may not exercise any control over the fund. Clerical functions related to the Fund shall be performed in the same manner as done with other normal funding provided to the assessor.

The hiring of individuals who will be paid from the Valuation Fund is done with the approval of the Valuation Commission. W. Va. Code § 11-1C-8(a). The Valuation Commission was created by West Virginia Code § 11-1C-3(a).

The Valuation Commission operates under the Department of Tax and Revenue and consists of the State Tax Commissioner (or the Tax Commissioner's designee), three (3) County Assessors and five (5) citizens of the State, one (1) of which shall be a certified appraiser, and two (2) County Commissioners. The assessors, five citizen members and two county commissioners are appointed by the Governor with the advice and consent of the Senate. W. Va. Code § 11-1C-3.

The Legislature went to great lengths to remove local political influence of County Commissions from the reappraisal process. This effort should not be overturned by this Court based upon the parade of possible "problems" asserted by the appellant. None of the parade of horrors prophesied by the appellant has occurred or is at issue in this case.

Even pursuant to West Virginia Code § 7-7-7, a County Commission does not have any input into the discharge of an elected

county official's assistant, deputy or employee. West Virginia Code § 7-7-7 in its last paragraph provides as follows:

Each county official named in this section shall have the authority to discharge any of his or her assistants, deputies or employees by filing with the Clerk of the County Commission a discharge statement specifying the discharge action: provided, that no deputy sheriff appointed pursuant to the provisions of Article 14, Chapter 7 of this code shall be discharged contrary to the provisions of that article.

Accordingly, the County Commission has no authority or input into decisions with respect to the discharge of an elected officials assistants, deputies or employees.

The clarity of the Legislature's intent expressed in West Virginia Code § 11-1C-8(a) is emphasized by the language of West Virginia Code § 11-1C-8(d). In Section 8(d) the Legislature expressly stated that the monies in the Valuation Fund "shall be available to and may be spent by the Assessor without prior approval of the County Commission, which may not exercise any control over the fund". There can be no question as to the legislative intent to preclude, either direct or indirect, control over the Valuation Fund by County Commissions.

When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the Courts, and in such cases it is the duty of the Courts not to construe but to apply the statute. State of West Virginia v. General Daniel Morgan Post No. 548, V.F.W., 144 W. Va. 137, 107

S.E.2d 353 (1959); Webster County Commission v. Clayton, 206 W. Va. 107, 522 S.E.2d 201 (1999). In this action the intent of the West Virginia Legislature to create a second category of employees of County Assessors is absolutely clear. The Legislature placed the advice and consent authority with the Valuation Commission not the County Commission. Accordingly, the legislative intent to remove County Commissions from the hiring decision with respect to employees hired under the Valuation Fund is manifest.

In this action, the Harrison County Commission attempts to exert indirect control over this fund by controlling who, if anyone, may be hired by the assessor to perform assessing and appraising duties as required by Article 1C of Chapter 11 of the West Virginia Code. County commissions have little interest in the proper assessing and appraisal of property as the revenue from property taxes does not benefit county commissions but instead benefits municipalities and boards of education.²

The Circuit Court correctly determined that Subsection (a) and Subsection (d) of West Virginia Code § 11-1C-8 expressly exclude County Commissions from any involvement in the County Assessor's Valuation Fund, including, but not limited to, the employment of individuals pursuant to the Valuation Fund. The Court further

² This is evidenced by the Harrison County Commission's effort in 2006 to keep property values in Harrison County at the 2005 level in some instances. This effort was thwarted by the West Virginia Tax Commissioner.

determined that this exclusion of the County Commission conflicted with the provisions of West Virginia Code § 7-7-7 which generally provides that elected county officials such as the County Clerk, Circuit Clerk, Joint Clerk of the County Commission and Circuit Clerk, if any, Sheriff, County Assessor and Prosecuting Attorney, may appoint and employ, to assist them in the discharge of their official duties ... assistants, deputies and employees, with the advice and consent of the County Commission.

By its express language, West Virginia Code § 7-7-7 is in direct conflict with West Virginia Code § 11-1C-8(a) which permits County Assessors to employ persons with the approval of the Valuation Commission. The appellant's effort to distinguish "appoint" from "employ" is purely a red herring. The legislative intent is clear and the conclusion of the Circuit Court was correct.

The appellants effort to distinguish between the use of the words "appoint" and "employ" in West Virginia Code § 7-7-7 is of no consequence. It is simply an effort by the Legislature to recognize that assistants and deputies are appointed while employees are hired. West Virginia Code § 11-1C-8 provides for the hiring of employees as opposed to the appointment of assistants or deputies.

West Virginia Code § 7-7-7 deals with the appointment of assistants and deputies and also the hiring of employees. The

usage of the word "appoint" and "employ" in West Virginia Code § 7-7-7 is of no effect with respect to the preclusion of the County Commission from any decisions with respect to the hiring of valuation employees pursuant to West Virginia Code § 11-1C-8.

In reviewing West Virginia Code § 7-7-7 and West Virginia Code § 11-1C-8, the Circuit Court applied the general rule of statutory construction which requires that a specific statute be given precedence over a general statute relating to the same subject matter when the two (2) statutes cannot be reconciled. UMWA by Trumpka v. Kingdon, 174 W.Va. 330, 325 S.E.2d 120 (1984); Carvey v. West Virginia State Board of Education, 206 W.Va. 720, 527 S.E.2d 831 (1999); Bowers v. Wurzburg, 205 W.Va. 450, 519 S.E.2d 148 (1999); Newark Insurance Company v. Brown, 218 W.Va. 346, 624 S.E.2d 783 (2005). West Virginia Code § 11-1C-8 specifically deals with the creation and control of the Valuation Fund. There is no question that it is a specific statute with respect to the Valuation Fund as opposed to the general provisions of West Virginia Code § 7-7-7 regarding the employment of deputies, assistants and employees by elected county officials.

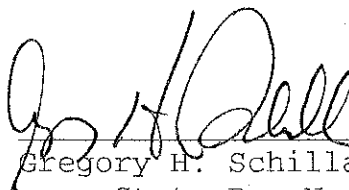
There is no possibility of reconciling West Virginia Code § 7-7-7 with West Virginia Code § 11-1C-8 in the manner proposed by the appellant. County Commissions are expressly excluded from any control, either direct or indirect, over the Valuation Fund. The legislative intent to remove County Commissions from any control,

direct or indirect, over the Valuation Fund is clear and unambiguous and must be respected by this Court.

CONCLUSION

For all of the foregoing reasons, the appellee, Cheryl L. Romano, Harrison County Assessor, respectfully requests that the September 18, 2006 Order of the Circuit Court of Harrison County be affirmed in all respects.

Dated this 9th day of August, 2007.



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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of August, 2007, I served the foregoing **BRIEF OF THE APPELLEE, CHERYL L. ROMANO, HARRISON COUNTY ASSESSOR** upon all opposing parties by depositing a true copy thereof in the United States mail, postage prepaid, in envelopes addressed as follows:

Michael J. Florio, Esquire
Florio Law Offices
333 East Main Street
Clarksburg, West Virginia 26301

